



Saar Blueprints

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How to Combat Information Warfare in the
Post-Truth Age



Programm für
lebenslanges
Lernen

05 / 2017 EN

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Preface

This publication is part of an e-paper series (Saar Blueprints), which was created as part of the Jean-Monnet-Saar activity of the Jean-Monnet Chair of Prof. Dr. Thomas Giegerich, LL.M. at the Europa-Institut of Saarland University, Germany. For more information and content visit <http://jean-monnet-saar.eu/>.

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Postfach 15 11 50
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ISSN

2199-0050 (Saar Blueprints)

Citation

Schmidt, Karoline, How to Combat Information Warfare in the Post-Truth Age, 05/2017 EN, online via: http://jean-monnet-saar.eu/?page_id=67

How to Combat Information Warfare in the Post-Truth Age

A. Introduction

The European Commission's decision that the decision by the Lithuanian regulator to suspend, for three month, the retransmission of a Russian language channel '*RTR Planeta*' containing incitement to hatred is compatible with EU Law falls within a time which can be described as the 'Post-Truth Age'. In December 2016 the Society for the German Language selected 'post-truth' (German: postfaktisch) as its "Word of the Year 2016".¹ According to the website 'Word of the Year' is a word which has dominated the public discourse and is particularly suitable to express the political, economic and social atmosphere in Germany.

This year's decision reflects a profound change in political discourse: while since the Enlightenment a rational and factual discussion has dominated political and social discourse, in recent times a shift towards a more intuitive approach becomes apparent in which emotions prevail over facts. Increasing parts of society, feeling betrayed by the 'establishment' and the political elite, are willing to ignore hard facts and believe obvious lies. Not necessarily the truth, but expressing the 'perceived truth' ('gefühlte Wahrheit') characterizes the 'Post-Truth Age'.² While this development is mainly associated with the presidential elections in the United States and the bewildering campaign of President Trump, twisting and turning facts, presenting alternative readings and interpretations of political and historical events has a long standing tradition in many countries especially the successor states of the former Soviet Union.³

The fine network of one-sided interpretations of historical and political events, but also propaganda for war and incitement to hatred created by Russia throughout the last century has been described as 'Soft Pressure'⁴, 'Antidiplomacy'⁵ and 'Information Warfare'.^{6,7} The idea behind these concepts lies in the observation that "since the collapse of the Soviet Union, the Kremlin has lost direct political and military control of the region, but it started mastering the tools of non-military influence by exploiting the lingering weakness of post-Soviet societies: growing internal political splits, social and economic discontent, ethnic

¹ Jochen A. Bär, Gesellschaft für Deutsche Sprache e.V., Pressemitteilung vom 09/12/2016, available at: <http://gfds.de/wort-des-jahres-2016/> (last accessed on 20/03/2017); it was also selected as the Oxford Dictionaries Word of the Year 2016, see <https://www.oxforddictionaries.com/press/news/2016/12/11/WOTY-16> (last accessed on 19/04/2017).

² Jochen A. Bär, (fn. 1).

³ EU-Ambassadors, quoted by ZEIT Online, Die EU zieht in den Propagandakampf, 20 March 2015, available at: <http://www.zeit.de/politik/ausland/2015-03/russland-propaganda-eu-strategie-informationskrieg> (last accessed 30/03/2017).

⁴ Nerijus Maliukevičius, Tools of destabilization, Kremlin's Media Offensive in Lithuania, Journal of Baltic Security, vol. 1, no. 1, 2015, p. 117.

⁵ Aleksandra Kuczyńska-Zonik, Antidiplomacy in Russia's Policies regarding Russian-Speakers in the Baltic States, Baltic Journal of Political Science, December 2016, no. 5, p. 89.

⁶ Mindaugas Kukyls and Raul Cârstocea, Instigations of Separatism in the Baltic States, June 2015, ECMI Issue Brief # 35, p. 3.

⁷ For a very good overview on Russia's 'Strategic communication', see: European Union Institute for Security Studies (EUISS), Directorate-General for external politics, EU strategic communication with a view to counteract propaganda, 2016, available at: [http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/578008/ EXPO_IDA\(2016\)578008_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/578008/ EXPO_IDA(2016)578008_EN.pdf) (last accessed on 19/02/2017).

minorities, and prevailing energy and media dependencies.”⁸ This attempt falls onto fertile ground in post-Soviet countries such as Lithuania where “[t]he popularity of the Russian language, positive attitude towards Russian culture and symbols, widespread nostalgia for the Soviet past creates a very favourable environment for the Russian media and its propaganda narratives [...]”.⁹ This is especially true since Lithuania has a vibrant Russian speaking minority. Even though the smallest and best integrated minority in the Baltic States, the Russian-speaking population in Lithuania is continuously influenced by Russian Media, e.g. 15,7 per cent of the audience in Lithuania regularly watch Russian TV channels.¹⁰ According to *Peter Pomerantsev* and *Michael Weiss* the Kremlin takes advantage of this media dependency by deliberately weaponizing information, money and culture in order to conduct a new vision of ‘hybrid’ or ‘non-linear’ war.¹¹ “This hybrid type of war, a specific 21st century phenomenon relying extensively on the strategic use of information and its dissemination [...] presents a challenge to the security of all countries in Europe”¹², particularly the Baltic States.¹³

The decision of the Lithuanian Radio and Television Commission (RTCL) to ban the rebroadcasting of a Russian TV channel on Lithuanian territory for three month, whose compatibility with EU Law the European Commission (EC) had to decide on, can be interpreted as a counteraction to Russian ‘Information Warfare’.

In the following I will take a closer look at these two decisions based on a summary of the EC’s decision. This will be followed by a short discussion of the term ‘Information Warfare’ with a view to distinguish the concept of ‘propaganda for war and incitement to hatred’ (which in most countries is illegal) from that of mere ‘one-sided interpretations of historical and political events’. In a third part the compatibility of the RTCL’s decision with EU Law will be analysed. Lastly, a comprehensive overview of three legally feasible and politically favourable measures against ‘Information Warfare’ (by the example of the concerned programme of *RTR Planeta*) on the national (with a focus on Lithuania), EU and international level will be given.

B. European Commission Decision – Summary

The EC adopted its decision on 17 February 2017¹⁴ pursuant to Article 3 (2) subpara. 2 of the Audio-visual Media Directive (Directive 2010/13/EU; short: AVMD)¹⁵ upon notification of the

⁸ *Nerijus Maliukevičius*, (fn. 4), p. 117.

⁹ *Ibid*, p. 120; for a similar opinion see: *Clay Moore*, *Western Promises – Sustainability and Consequences for Baltic Security*, Fall 2015, p. 17 (18).

¹⁰ *Nerijus Maliukevičius*, (fn. 4), p. 122.

¹¹ *Peter Pomerantsev* and *Michael Weiss*, *The Menace of Unreality: How the Kremlin Weaponizes Information, Culture and Money*, Institute of Modern Russia (New York), 2014, p. 29, available at: <http://www.interpretermag.com/wp-content/uploads/2015/07/PW-31.pdf> (last accessed on 24/03/2017).

¹² *Mindaugas Kukyls* and *Raul Cârstocea*, (fn. 6), p. 3.

¹³ *Aleksandra Kuczyńska-Zonik*, (fn. 5), p. 96.

¹⁴ European Commission, Decision of 17.2.2017 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audio-visual media services, Brussels 17/02/2017, C(2017) 814 final.

¹⁵ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), 15 April 2010, OJ L 95, p. 1.

Lithuanian government on 2 December 2016 of its decision to temporarily suspend the retransmission, including on the internet, of the television broadcast *RTR Planeta* in the territory of Lithuania for a period of three months.¹⁶ Art. 3 AVMD provides that Member States may only restrict retransmissions on their territory of audiovisual media services on enumerated grounds, among those manifest, serious and grave infringements of Art. 6 AVMD which outlaws any incitement to hatred based on race, sex, religion or nationality. Art. 3 (2) subpara. 2 AVMD lays down that it shall, within two months following notification of the measures taken by the Member State, take a decision on whether the measures are compatible with Union law.

RTR Planeta is broadcasted by the Russian State Television and Radio Broadcasting Company (VGTRK), but falls under the Swedish jurisdiction as it is registered as *Rossia RTR* by the Swedish broadcasting authorities and is broadcasted from Sweden.¹⁷

Lithuania claimed that *RTR Planeta*'s broadcasting fell within the purview of Art. 3 para. 1 lit. a AVMD by repeatedly propagating the instigation of war and incitement to hatred and calling for the physical destruction of, among others, Turkey, Ukraine, the United States and the Baltic States. According to the Lithuanian authorities the statements made on the television programme were aimed at creating tensions and reactions of animosity or rejection from the Russian minority in Lithuania towards the Lithuania-speaking minority.¹⁸

The Commission found that the Lithuanian authorities had respected the procedural requirements laid down in Art. 3 (2) AVMD, including the broadcaster's right to be heard and their notification obligations towards the Swedish Government and the European Union.¹⁹

In order to determine whether the alleged statements amounted to 'incitement to hatred' the EC referred to the *Roj TV Case*²⁰ in which the European Court of Justice (ECJ) had interpreted the word 'incitation' as an action intended to direct specific behaviour and 'hatred' as a feeling of animosity or rejection with regard to a group of persons.

Based on the abovementioned definitions the EC decided that the information provided by the Lithuanian government concerning the statements made by *RTR Planeta* was sufficient to consider the alleged statements as incitement to hatred.²¹ Furthermore it held that, taking into account the history of Lithuania as an ex-Soviet State, the potential tensions created by statements of *RTR Planeta* between the Russian-speaking minority and the Lithuanian-speaking majority and the fact that these statements were partly related to an ongoing military confrontation involving Russia and contained unambiguous threats of occupation and destruction of other states, including the Baltic States, the infringement was manifest, serious and grave.²² Finally the measures taken by Lithuania were neither considered discriminatory nor disproportionate to the objective of ensuring that media service providers comply with the rules of Art. 6 AVMD.²³

¹⁶ Commission Decision of 17.2.2017, (fn. 14), para. 7.

¹⁷ Commission Decision of 17.2.2017, (fn. 14), para. 9.

¹⁸ Commission Decision of 17.2.2017, (fn. 14), para. 17.

¹⁹ Commission Decision of 17.2.2017, (fn. 14), para. 15.

²⁰ ECJ, Judgement of the Court of 22 September 2011, *Mesopotamia Broadcast and Roj TV*, Joined Cases C-244/10 and C-245/10.

²¹ Commission Decision of 17.2.2017, (fn. 14), para. 18.

²² Commission Decision of 17.2.2017, (fn. 14), para. 19.

²³ Commission Decision of 17.2.2017, (fn. 14), para. 20.

The Commission rejected the defence of the broadcaster that views expressed by guests of talk shows were outside the broadcaster's editorial responsibility (referring to the definition of editorial responsibility in Art. 1 (1) lit. a AVMD) and a restriction of such opinions would lead to censorship.²⁴ Furthermore the Commission dismissed the argument that difficulties to define 'incitement to hatred' and the absence of a definition of the concept of 'propaganda' in national and international law made it unlawful to impose sanctions on the broadcaster because of a violation of these (unclear) concepts.²⁵ Also, the Commission did not find a violation of the broadcaster's fundamental right to freedom of expression enshrined in Art. 11 Charter of Fundamental Rights (CFR). Pursuant to Art. 52 (1) CFR the rights and freedoms recognised in the CFR could be subject to limitation provided for by law. By enacting the AVMD the legislator had chosen to limit the freedom of expression of audio-visual media services for the protection of minors (Art. 27 AVMD) and the prevention of incitement to hatred based on race, sex, religion and nationality (Art. 6 AVMD).²⁶

The Commission therefore concluded that the measures notified by Lithuania on 2 December 2016 were compatible with Union Law.

C. The Meaning of Information Warfare – Distinguishing between Propaganda and One-sided Interpretations

It is the fate of a counteraction that its legality depends on the character of the action preceding it. In order to determine the legality of the RTCL's decision, it is therefore necessary to take a closer look at the actions of *RTR Planeta* and determine their character. *Andrei G. Richter* notes in this regard that "the courts suffer distinguishing between illegal 'propaganda for war and incitement to hatred' and propaganda of 'one-sided interpretation' of the conflicts. All these terms are somewhat raw, controversial, and infrequently parsed in the legal process."²⁷ A similar distinction is drawn by the OSCE Office of the Representative on Freedom of the Media. It suggests distinguishing – at law and policy level – between two sorts of propaganda in the media. "The first is propaganda for war, as well as national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, as defined in international and national law. It is illegal and therefore demands judicial action with the appropriate measures in line with international human rights law standards. The second type of propaganda combines *all the rest*. It may be an inappropriate and scornful activity; it damages the profession of journalism, but does not necessarily call for legal action."²⁸ This second type of propaganda is what *Richter* describes as "one-sided interpretation".

²⁴ Commission Decision of 17.2.2017, (fn. 14), para. 21, 23.

²⁵ Ibid.

²⁶ Commission Decision of 17.2.2017, (fn. 14), para. 22.

²⁷ *Andrei G. Richter*, Legal Responses to Propaganda Broadcasts Related to Crisis in and Around Ukraine, *International Journal of Communication*, 2015, vol. 9, p. 3125 (3140).

²⁸ *Office of the OSCE Representative on Freedom of the Media*, Non-Paper, Propaganda and Freedom of the Media, Vienna 2015, p. 32, available at: <http://www.osce.org/fom/203926?download=true> (last accessed on 31/03/2017).

I. Propaganda

According to the Oxford English Dictionary 'propaganda' is "the systematic dissemination of information, especially in a biased or misleading way, in order to promote a political cause or point of view"²⁹.

Regarding methods typically used for 'propaganda' and distinguishing it from other forms of rhetoric, *Nowak* has pointed out that it constitutes "intentional, well-aimed influencing of individuals by employing various channels of communication to disseminate, above all, incorrect or exaggerated allegations of fact. Also included thereunder are negative or simplistic value judgements whose intensity is at least comparable to that of provocation, instigation, or incitement."³⁰

II. Propaganda for war

'Propaganda for war' has been defined by the Human Rights Committee (HRC) in General Comment 11 as encompassing "all forms of propaganda threatening or resulting in an act of aggression or breach of the peace contrary to the Charter of the United Nations"³¹. The HRC however makes a significant exclusion from the scope of the crime, by emphasising that Art. 20 (1) does "not prohibit advocacy of the sovereign right to self-defence or the right of peoples to self-determination and independence in accordance with the Charter of the United Nations."³²

Moreover the UN General Assembly has delivered a rather clear definition of 'war propaganda' condemning "all forms of propaganda, in whatsoever country conducted, which is either designed or likely to provoke or encourage a threat to the peace, breach of the peace, or act of aggression"³³.

III. Incitement to Hatred

Defining 'incitement to hatred' (also called: 'hate speech') appears much more problematic. It has been noted by the Press Unit of the European Court of Human Rights (ECtHR) that "there is no universally accepted definition of the expression 'hate speech'"³⁴.

²⁹ Oxford English Dictionary, 2017, Oxford University Press, 'propaganda', n., available at: <http://www.oed.com/view/Entry/152605?rskey=hyddW4&result=1&isAdvanced=false> (last accessed on 03/04/2017).

³⁰ *Manfred Nowak*, UN Covenant on Civil and Political Rights – CCPR Commentary, 2. ed., 2005, p. 472.

³¹ *Human Rights Committee*, General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20), 29/07/1983. CCPR General Comment No. 11 (General Comments), available at: <http://www.ohchr.org/Documents/Issues/Opinion/CCPRGeneralCommentNo11.pdf> (last accessed on 31/03/2017).

³² *Ibid.*

³³ *General Assembly*, Resolution adopted by the General Assembly 110 (II), Measures to be taken against propaganda and the inciters of a new war, 108th plenary meeting, 3 November 1947, A/RES/2/110, available at: <http://www.un-documents.net/a2r110.htm> (last accessed on 31/03/2017).

³⁴ *Press Unit of the European Court of Human Rights*, Factsheet on 'Hate Speech', July 2013, available at: <http://www.mjusticia.gob.es/cs/Satellite/Portal/1292427369687?blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobheadername2=Grupo&blobheadervalue1=attachment%3B+filename%3D>

However an attempt to define 'hate speech' has been made by the Council of Europe's Committee of Ministers in their Recommendation No. R (97) 20 defining 'hate speech' as "all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin."³⁵

As the OSCE Office of the Representative on Freedom of the Media has noted this formula is circular, as it defines 'hatred' through 'hate' and 'hate' through 'hatred'.³⁶

A more handy definition has been delivered by the 'Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence' released by the UN Office of the High Commissioner for Human Rights (OHCHR) in 2012,³⁷ which refers to the Camden Principles on Freedom of Expression and Equality (Camden Principles). The Camden Principles define 'hatred' and 'hostility' as "intense and irrational emotions of opprobrium, enmity and detestation towards the target group"³⁸.

The most precise definition has probably been given by the ECJ in its *Roj TV* judgement of 22 September 2011, explaining the meaning of the words 'incitement' and 'hatred' as "the first one refer[ing] to an action intended to direct specific behaviour, and the second refer[ing] to a feeling of animosity or rejection with regard to a group of persons"³⁹.

A clear distinction between 'propaganda to war' and 'incitement to hatred' is not always possible, as "propaganda for war is, in fact, a form of incitement to violence based on advocacy of national, racial or religious hatred."⁴⁰ In academic and court decisions both concepts are used alternatively.

IV. Application to the Decision by the Lithuanian Radio and Television Commission of 16 November 2016

In the case at hand the Lithuanian authorities found 'propaganda for war' and cases of "incitement to war, ethnic based hatred, stigmatising, calling to violence and physical action

Hate_speech_julio_de_2013.PDF&blobheadervalue2=Docs_Libertad+religiosa_interes (last accessed on: 31/03/2017).

³⁵ *Council of European Committee of Ministers*, Recommendation No. R (97) 20 of the Committee of Ministers to Member States on "Hate Speech", (Adopted by the Committee of Ministers on 30 October 1997

at the 607th meeting of the Ministers' Deputies), available at:

<https://rm.coe.int/CoERMPublicCommonSearch>

[Services/DisplayDCTMContent?documentId=0900001680505d5b](https://rm.coe.int/CoERMPublicCommonSearch/Services/DisplayDCTMContent?documentId=0900001680505d5b) (last accessed on 21/03/2017).

³⁶ *Office of the OSCE Representative on Freedom of the Media*, (fn. 28), p. 34.

³⁷ *United Nations Human Rights Office of the High Commissioner*, Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence - Conclusions and recommendations emanating from the four regional expert workshops organised by OHCHR, in 2011, and adopted by experts in Rabat, Morocco on 5 October 2012, para. 19, available at: http://www.un.org/en/preventgenocide/adviser/pdf/Rabat_draft_outcome.pdf (last accessed on 31/03/2017).

³⁸ The Camden Principles on Freedom of Expression and Equality, Article 19, Global Campaign for Free

Expression, London April 2009, Principle 12 - Incitement to Hatred, available at:

<https://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf> (last accessed on 31/03/2017).

³⁹ *Roj TV Case*, (fn. 20), para. 41.

⁴⁰ *Office of the OSCE Representative on Freedom of the Media*, (fn. 28), p. 14.

against certain countries such as the USA, Romania, The Czech Republic, Poland and the Baltic States".⁴¹

The Commission analysed several statements made during the programme 'The Duel – A programme by Vladimir Solovyov' finding that it contained a systematic dissemination of biased and misleading information amounting to a threat to peace and promoting an act of aggression. In this regard the RTCL stated that the intention of the broadcaster was "to intimidate and convince the intended audience that the USA is the axis of evil that needs to be fought against with a gun"⁴². They cite a participant of the show stating: "Our reply to make those planning an attack on our country calm down. Such plans exist, they are [provided] in writing and they contain signatures and stamps, and they have been voiced out by all the US presidents. I personally am not the president of our country but I am telling you, [...] there will be nothing left of Romania either. And also in the Czech Republic, if there is (.....) and also in Poland and the Baltic States, if the American tanks come close to our border, they will not retreat, they will not move back. They will burn together with the entire crew." (V. Zhirinovsky). [...] „You are everywhere, everywhere, your disgusting traces are everywhere, you provocateurs. You have incited all the wars and you are now getting ready for your usual military ventures but I am warning you Michael Bohm, we have enough bomb shelters for everyone – 100 %, and you have none, you should think about your citizens..." (V. Zhirinovsky).⁴³

Throughout the programme the USA are being portrayed as aggressors, linking US military actions to terrorist attacks. A guest of the show claimed that the USA have already occupied 150 countries and that they were seeking war, not Russia: "That's what they have been saying since May 1945. Our soldiers do not go close to the American border, they move towards us. Are you saying you want to have June 22? I am just saying. All Americans think that they will start first and then the bombs will drop on our heads again? This is not happening again. It will all become clear on June 20. There will be no more June 22 for you Americans, and also for you in Romania (pointing to the journalist)." (V Zhirinovsky).⁴⁴

These statements perfectly show that an aggression by Russia against the 'West' especially the US and its Eastern European allies is being justified by claiming an act of self-defence against Western aggression, which has not taken place. Such an aggression by Russia would thus violate its obligations under the UN-Charter and could not be justified by the right to self-defence. Such threats therefore clearly constitute propaganda to war.

Furthermore the RTCL found several statements delivered in a special (aggressive) language made during the show creating a feeling of animosity or rejection with regard to a group of persons (e.g. Americans and its Eastern European Allies) and calling for violent actions against those. According to the RTCL the show "projects obvious and univocal incitement to violence against the USA, Romania, the Czech Republic, Poland and the Baltic States."⁴⁵ This can be seen from a statement made during the programme reading "On June

⁴¹ *The Radio and Television Commission of Lithuania (RTCL)*, Resolution regarding suspension of free reception of *RTR Planeta TV Services*, 16 November 2016, No KS-200, Vilnius, p. 3, available in Lithuanian at: <http://www.rtk.lt/content/uploads/2016/11/ks-200-2016.pdf> (last accessed on 24/04/2017; an English copy lies with the author).

⁴² *Ibid*, p. 4.

⁴³ *Ibid*; The reference to June 22 probably refers to the act of aggression by Nazi Germany against the Soviet Union which began on 22 June 1941.

⁴⁴ *Ibid*.

⁴⁵ *Ibid*, p. 4.

20 everything will be destroyed – everything. And you will announce to the people of Bucharest from a bunker about the Russian flag descending over Bucharest“, „In the Baltic States, if the American tanks come close to our borders they will not retreat, they will not move back. They will burn together with the entire crew“⁴⁶.

The intention of such a comment is clearly to incite hatred between Russians and American, Romanians and Lithuanians (in this case).

It can thus be concluded that the RTCL rightfully declared the statements made during the *RTR Planeta* Programmes to constitute ‘propaganda to war and incitement to hatred’.

D. Possibilities to Counteract Information Warfare

The possibilities to counteract information warfare differ depending on the character of the action. One-sided interpretations of historical and political events (as defined above) are generally protected by the fundamental right of freedom of the press/media: e.g. Art. 19 Universal Declaration of Human Rights (UDHR), Art. 19 International Covenant on Civil and Political Rights (ICCPR), Art. 11 European Convention on Human Rights (ECHR)⁴⁷, Art. 25 Lithuanian Constitution. Based on Art. 17 ECHR an exception is being made for repeated denial of the Holocaust.⁴⁸ The proportionality of a restriction of the freedom of opinion differs from case to case and must be determined individually. The case at hand however was correctly classified as ‘propaganda to war’ and ‘incitement to hatred’, which is why this analysis will be focusing on the legal possibilities to counteract ‘propaganda to war’ and ‘incitement to hatred’. In the following I will thus take a closer look on the legal countermeasures against ‘propaganda for war and incitement to hatred’ through audio-visual Media and their political implications.

I. Legal Implications

1. National Law – Lithuania

The national foundation for the prohibition of propaganda for war and hatred lies in the Constitution of the Republic of Lithuania (Lithuanian Constitution). Art. 135 of the Lithuanian Constitution establishes that “in the Republic of Lithuania war propaganda shall be prohibited”⁴⁹. Furthermore according to Art. 25 Lithuanian Constitution the “freedom to express convictions and to impart information shall not extend to criminal actions—incitement of national, racial, religious, or social hatred, violence and discrimination, with slander and disinformation.”⁵⁰

More concrete prohibitions can be found in Lithuanian statutory law. Even though propaganda for war does not constitute a criminal offence under the Lithuanian Criminal Code, Art. 170 punishes public incitement to violence on the grounds of “sex, sexual

⁴⁶ Ibid.

⁴⁷ *Hans D. Jarass (ed.)*, Charta der Grundrechte der EU - Kommentar, 3. Aufl. 2016, Art. 11, Rn. 11.

⁴⁸ For Art. 11 ECHR see, *Hans D. Jarass*, in: *Jarass (ed.)*, Charta der Grundrechte der EU - Kommentar, 3. Aufl. 2016, Art. 11, Rn. 11.

⁴⁹ Art. 135 Constitution of the Republic of Lithuania, adopted on 25 October 1992, available at: http://www.wipo.int/wipolex/fr/text.jsp?file_id=188281#LinkTarget_261 (last accessed on 27/03/2017).

⁵⁰ Art. 25 Constitution of the Republic of Lithuania, adopted on 25 October 1992, available at: http://www.wipo.int/wipolex/fr/text.jsp?file_id=188281#LinkTarget_856 (last accessed on 27/03/2017).

orientation, race, nationality, language, descent, social status, religion, convictions or views or finances”⁵¹.

Relevant for the prohibition of propaganda in audio-visual media is however Art. 19 of the Law on the Provision of Information (LPI)⁵². The LPI echoes the constitution by prohibiting the media from disseminating information that “spreads propaganda, instigates war or hatred, ridicule, humiliation, instigates discrimination, violence, physical violent treatment of a group or a person belonging thereto on grounds of age, sex, sexual orientation, ethnic origin, race, nationality, citizenship, language, origin, social status, belief, convictions, views or religion” (Art. 19 (1) subpara. 3 LPI). In addition Art. 19 (2) LPI prohibits “to disseminate disinformation and information which is slanderous and offensive to a person or which degrades his honour and dignity”.

Art. 34 (11) LPI provides that “free reception in the Republic of Lithuania of television programmes [...] from countries other than the EU Member States [...] may be suspended upon a decision of the [Lithuanian Radio and Television] Commission if such television programmes [...] of those countries violate the requirements of Articles 17 or 19 of this Law”.

A decision by the RTCL to suspend television programmes needs approval by an administrative court.⁵³

Based on these provisions the RTCL obtained such an approval for a three month suspension of rebroadcasting of the programme *Weekly News* by *RTR Planeta* on 7 April 2014.⁵⁴ The RTCL argued that “this weekly review included non-objective and tendentious information that justified violence against residents, military intervention in a sovereign state (Ukraine), and the annexation of a part of it, thus encouraging military activities and fomenting hatred between Russians and Ukrainians”⁵⁵.

In yet another decision the RTCL suspended for three month rebroadcasts of the programme *The Territory of Misinterpretation* by *REN TV Baltic*, another Russian TV Channel rebroadcasted from the UK.⁵⁶ The RTCL argued that the broadcaster “disseminated biased and tendentious information about events in Ukraine and war-mongering and hate propaganda against Ukrainians and the legitimate Ukrainian government, as well as against EU and NATO countries that support the sovereignty and territorial integrity of Ukraine”⁵⁷.

In both cases the courts found a violation of Art. 19 (1) subpara. 2 LPI and therefore regarded the decision to suspend the programmes compatible with Art. 34 (11) LPI.

⁵¹ Lithuanian Criminal Code, 26 September 2000 No VIII-1968, as last amended on 9 July 2009 – No XI-330, Vilnius, available at: https://ec.europa.eu/anti.../criminal_code_lithuania_en_1.dochttps://webcache.googleusercontent.com/search?q=cache:nKnA_ODKQZoJ:https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/criminal_code_lithuania_en_1.doc+&cd=3&hl=de&ct=clnk&gl=de (last accessed on 27/03/2017).

⁵² Law on the Provision of Information, 2 July 1996 – No I-1418, as last amended on 23 December 2015 – No XII-2239, Vilnius, available at: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/2865241206f511e687e0fbad81d55a7c?jfwid=1clcwosx33> (last accessed 27/03/2017).

⁵³ *Andrei G. Richter*, (fn. 27), p. 3128.

⁵⁴ Decision by the Vilnius District Court, No. KS-59, 2 April 2014.

⁵⁵ *Richter*, (fn. 27), p. 3128.

⁵⁶ *The Radio and Television Commission of Lithuania*, Resolution regarding suspension of free reception of Ren TV Baltic, 12 January 2015, No. KS-12, Vilnius.

⁵⁷ *Richter*, (fn. 27), p. 3128.

2. European Union Law

The foundation for the justification of prohibiting propaganda for war and hatred in EU Law lies within the CFR. Art. 11 (1) CFR provides that everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. According to Art. 11 (2) CFR the freedom and pluralism of the media shall be respected.

Art. 52 (1) CFR however stipulates that the exercise of the rights and freedoms recognised by this Charter can be limited. Such limitations must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

Yet it could be argued that not only a justification of prohibiting such propaganda can be found within the European fundamental rights regime, but that European fundamental rights *oblige* the EU and its Member States to effectively prevent it. As has been noticed,⁵⁸ European fundamental rights can evoke the protective duty of the EU and especially its Member States. The *Schmidberger* and *Omega* decisions of the ECJ⁵⁹ can be understood in that way.⁶⁰ However, Art. 51 (2) CFR makes it very clear that a protective duty may not establish any new power for the Union, but has to be fulfilled on the basis of an already existing power.

Art. 11 CFR does not explicitly oblige its addressees to prohibit propaganda and therefore does not alone establish a protective duty. Yet Art. 6 (3) TEU states that besides the fundamental rights recognised by the CFR, fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law. The reference to the ECHR could be taken as a *pars pro toto* for the entirety of the human rights treaty obligations of all Member States. In its *Nold* case the ECJ stated that similarly to drawing inspiration from the constitutional traditions of the Member States, "international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law".⁶¹ Even though the wording of Art. 6 (3) TEU appears narrower than these earlier judgments of the ECJ, referring only to the ECHR, the provision should be read as an affirmation of this jurisprudence rather than a restriction.⁶² In the ECHR there is no explicit provision outlawing propaganda for war and hatred.⁶³ However, all EU Member States have ratified the International Covenant on Civil and Political Rights (ICCPR⁶⁴) and its Art. 20 ICCPR, prohibiting any propaganda for war and advocacy of national, racial or religious hatred that

⁵⁸ For a comprehensive overview see: *Peter Szczekalla*, Die sogenannten grundrechtlichen Schutzpflichten im deutschen und europäischen Recht, 2002, p. 459; *Dirk Ehlers*, Europäische Grundrechte und Grundfreiheiten, 4th ed., 2014, p. 534.

⁵⁹ See ECJ, Judgment of 12 June 2003, *Schmidberger v. Austria*, C-112/00, para. 74; ECJ, Judgment of 14 October 2004, *Omega*, Case C-36/02, para. 35.

⁶⁰ *Dirk Ehlers*, (fn.58).

⁶¹ ECJ, Judgment of 14 Mai 1974, *Nold v. Commission*, C-4/73, para. 13; affirmed in ECJ, Judgment of 13 December 1979, *Hauer*, C 44/79, para. 15.

⁶² *Sarah Schadendorf*, Die UN-Menschenrechtsverträge im Grundrechtsgefüge der Europäischen Union, EuR 2015, 28 (37).

⁶³ See below, section D.I.3.

⁶⁴ Ratified by Lithuania on 20 November 1991.

constitutes incitement to discrimination, hostility or violence, triggers the protective duty of governments.⁶⁵ An explicit obligation to outlaw propaganda for war and incitement to hatred can also be found in Art. 4 of the International Convention on the Elimination of All Forms of Racial Discrimination⁶⁶ (CERD), which has been ratified by all EU Member States⁶⁷ as well. Even though ratified by fewer EU Member States,⁶⁸ similar provisions are included in the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems⁶⁹ (Additional Protocol to the Cybercrime Convention).⁷⁰ This shows that there is a common recognition by EU Member States of a protective duty to prevent propaganda for war and incitement to hatred on the level of international human rights law. If one takes into consideration that the EU professes to contribute to the protection of human rights as well as to the strict observance and the development of international law (Art. 3 (5) TEU), there are thus good arguments to recognise a protective duty of the state within the EU fundamental rights regime and consequently assume an obligation of the EU and its Member States to effectively prevent propaganda for war and incitement to hatred as a matter also of EU law. This reading of Art. 6 (3) TEU in connection with Art. 3 (5) TEU however enlarges the circle of positive obligations guaranteed by the fundamental rights recognised as general principles of the Union's law extensively and could lead to conflicts of competences between the ECJ on the one side and other treaty governing bodies such as the Human Rights Committee (HRC) or the Committee on the Elimination of Racial Discrimination (CERD) on the other. Conflicts could especially arise concerning the competence to interpret the concerned treaties and to demand compliance with treaty obligations. Seeming to have similar concerns the ECJ so far has mainly referred to international human rights treaties to merely support its findings under EU law.⁷¹

It is thus far fetched to establish a strict protective duty under EU law obliging Member States to prohibit propaganda for war and incitement to hatred. In extreme cases it is however likely that taking into consideration international human rights obligations conceded by all Member States the ECJ would limit the Member States discretion to only one possible lawful decision: the prohibition of such propaganda.

The specific legal basis to counteract propaganda however is provided for by the Audio-visual Media Service Directive (AVMSD). The Commission has started to update the AVMSD as part of its "Digital Single Market strategy".⁷² The latter was adopted by the EC on the 6

⁶⁵ See below, section D.I.3.

⁶⁶ International Convention on the Elimination of All Forms of Racial Discrimination, adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 entry into force 4 January 1969, available at:

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx> (last accessed on 26/04/2017).

⁶⁷ A list of ratifications can be found here: <http://indicators.ohchr.org/> (last accessed on 26/04/2017).

⁶⁸ A list of ratifications can be found here: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/189/signatures?p_auth=UtnYWK4V (last accessed on 26/04/2017).

⁶⁹ Council of Europe, Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems Strasbourg, 28.I.2003, Council of Europe Treaty Series No. 189, available at:

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168008160f> (last accessed on 26/04/2017).

⁷⁰ See below, section D.I.3.

⁷¹ Schadendorf, fn. (62), p. 40.

⁷² For further information see: *Indrek Ibrus*, The EU Digital Single Market as a mission impossible: Audio-visual policy conflicts for Estonia, *International Journal of Digital Television*, 2016, 7:1, p. 23, doi:10.1386/jdtv.7.1.23_1.

May 2015.⁷³ It aims at creating the right environment and conditions for digital networks and services to flourish by providing high-speed, secure and trustworthy infrastructures and services supported by the right regulatory conditions.”⁷⁴ As part of its “Digital Single Market strategy”, the EU has implemented rules applying to audio-visual media services such as traditional broadcasters, video-on-demand providers and online (video sharing) platforms.

Art. 3 (1) AVMSD echoes the CFR by stipulating that Member States shall ensure the freedom of reception and shall not restrict retransmission on their territory of audio-visual media services from other Member States for reasons which fall within the fields coordinated by the Directive.

Art. 3 (2) AVMSD provides for an exception to this rule where a television broadcast from another Member State manifestly, seriously and gravely infringes Art. 27 (1) or (2) AVMSD relating to the protection of minors and/or Art. 6 AVMSD on incitement to hatred based on race, sex, religion or nationality and lays out the conditions which need to be fulfilled to make use of such an exception (i.e. impose a limitation). Art. 3 (4) AVMSD stipulates a similar exception for on-demand audio-visual media services.

Art. 6 AVMSD requires Member States to ensure that audio-visual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality.

According to Art. 3 (2) subpara. 2 AVMSD the [European] Commission shall within two months following the notification of the measures taken by the Member States, take a decision on whether they are compatible with EU Law.

The Commission adopted such a decision on 10 July 2015 for the first time. In it the EC concluded that the three month suspension of the retransmission of the Russian-language channel *RTR Planeta* by the Lithuanian authorities, in view of several infringements of Art. 6 AVMSD, was in accordance with EU Law.

The decision at issue seamlessly continues this practice. Instead of invoking national law (as they did before – see above) the Lithuanian authorities referred to EU Law in order to justify the suspension of the rebroadcasting of *RTR Planeta*. This approach raises three legal issues: the assessment whether there actually was a case of propaganda for war or incitement to hatred, the lawfulness of the limitation of the freedom of expression and the question of editorial control.

In the case at hand the Commission undisputedly and clearly found a case of propaganda for war and an incitement to hatred (as defined in the *Roj TV Case* by the ECJ – see above), laying down at length that the infringement actually was manifest, serious and grave.⁷⁵

Furthermore they correctly decided that even though the suspension of rebroadcasting *RTR Planeta* encroached upon the broadcaster’s right to freedom of expression, such a limitation

⁷³ *European Commission*, A Digital Single Market Strategy for Europe, Brussels, 6.5.2015, COM(2015) 192 final, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52015DC0192&from=EN> (last accessed on 28/03/2017).

⁷⁴ *European Commission*, Right environment for digital networks and services, available at: <https://ec.europa.eu/digital-single-market/node/78516> (last accessed on 28/03/2017).

⁷⁵ Commission Decision of 17.2.2017, (fn. 14), para. 17-20.

was justified according to Art. 52 (1) CFR, as it was provided for by law through Art. 3 (1) AVMSD and respected the essence of this right as well as the principle of proportionality.⁷⁶

The only question which actually seems problematic is that of editorial control. The Commission rejected the defence of the broadcaster that views expressed by guests of talk shows were outside the broadcaster's editorial responsibility duly referring to the definition of editorial responsibility in Art. 1 (1) lit. a AVMD.⁷⁷ In the case of television broadcasts 'editorial responsibility' means the exercise of effective control both over the selection of the programmes and over their organisation in a chronological schedule. However, neither the EC nor the RTCL elaborated on the question arising from the situation of the broadcaster being formally licensed in an EU country, but the programme being actually produced in the Russian Federation. In an earlier decision the RTCL' position, affirmed by the Vilnius Regional Court, was that "though the broadcaster was formally licensed in an EU country (Ren TV Baltic in the UK), its programmes were produced in the Russian Federation and the EU Company had no editorial control or influence over their content. Thus restrictions were supposedly directed against broadcasters that do not fall under the protection of the procedures provided in Article 3 (2) of the AVMSD."⁷⁸ By holding the Swedish *RTR Planeta* broadcaster responsible for the infringements of Art. 3 (2) AVMSD at hand the Lithuanian authorities have clearly abandoned this position turning towards a much broader approach of editorial responsibility, which has been indirectly affirmed by the Commission. This 'change in direction' can be interpreted as a the expression of a general attitude of EU institutions (including the ECJ) and the ECtHR to hold audio-visual media services, especially internet service providers, such as video-sharing platforms, responsible for comments, opinions and statements expressed on their platform/in their programmes.⁷⁹ This attitude can, in my opinion, be explained by the increasing challenges of creating a legal framework concerning the internet, the impossibility to apply the conventional territorial principle of jurisdiction to matters concerning the Internet and the possibilities of Internet service providers to circumvent responsibility by using loopholes appearing as a result of these challenges.

Overall the decision of the Commission appears to be a good example of the application of EU Law counteracting propaganda, as the Commission rightfully holds the suspension of *RTR Planeta* to be in line with EU Law. Notwithstanding this, it would have been desirable for the Commission to elaborate upon the question of editorial responsibility despite the fact that this defence has not been brought forward by the broadcaster.

3. International Law

Several provisions in international law deal with the freedom of expression and the media. The most relevant provisions in this regard for the European countries are Art. 10 ECHR, Art. 19 and 20 of the International Covenant on Civil and Political Rights (ICCPR), Art. 4 CERD and the provisions of the Additional Protocol to the Cybercrime Convention.

Art. 10 ECHR protects the freedom of expression. According to the ECtHR this includes all "information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter

⁷⁶ Commission Decision of 17.2.2017, (fn. 14), para. 22.

⁷⁷ Commission Decision of 17.2.2017, (fn. 14), para. 23.

⁷⁸ *Richter*, (fn. 27), p. 3130.

⁷⁹ For an example of jurisprudence in this regard see: *Karoline Schmidt*, Analyse des EGMR-Urteils Magyar Tartalomszolgáltatók Egyesülete und Index.hu Zrt gegen Ungarn (App. No. 22947/13) - Wie weit reicht die Meinungsfreiheit von Internet Service Providern?, Saar Brief, 02/2016, available at: <http://jean-monnet-saar.eu/?p=1229> (last accessed on 29/03/2017).

of indifference, but also [...] those that offend, shock or disturb the State or any sector of the population.”⁸⁰ (Handyside Formula).

There is however no explicit provision in the ECHR outlawing propaganda.

Certainly the freedom of expression is not guaranteed to an unlimited extent. The Court noted in *Erbakan v Turkey* that “... [T]olerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance [...], provided that any ‘formalities’, ‘conditions’, ‘restrictions’ or ‘penalties’ imposed are proportionate to the legitimate aim pursued.”⁸¹ The ECtHR has found in several cases that restrictions can be put on the protection afforded by Art. 10 ECHR in cases of propaganda for war and incitement to hatred. In cases of propaganda for ethnic⁸², racial⁸³ and religious⁸⁴ hate the ECtHR found that the remarks were directed against the Convention’s underlying values and would therefore be removed from the protection of Article 10 ECHR by Article 17 ECHR (“prohibition of abuse of rights”).

In cases of “incitement to ethnic hatred”⁸⁵, “incitement to racial discrimination or hatred”⁸⁶ and “incitement to religious intolerance”⁸⁷ the ECtHR found that even though those remarks generally fell under the protection of Art. 10 ECHR, suppressing such statements would be lawful if prescribed by law, pursuing one or more legitimate aims, and, if it is necessary in a democratic society to achieve these aims.

The Lithuanian authorities/courts themselves so far have not referred to the ECHR when suspending audio-visual media programmes due to propaganda for war and incitement to hatred. In a similar case however, the Latvian Regulator NEPLP (National Electronic Mass Media Council of Latvia) dedicated a significant amount of its argumentation to prove that its decision to suspend the rebroadcasting of the Russian Programme Rossiya RTR was made in accordance with Art. 10 and 17 ECHR.⁸⁸

In particular the NEPLP admitted that suspending the rebroadcasts of Rossiya RTR infringed the right to freedom of expression of the TV Channel. However they found that in this case “the public benefit of ‘not being subject to propaganda’ outweighed the encroachment of the broadcaster’s right. The public interest involved protecting the audience from non-objective and tendentious news and other broadcasts that called for war or a military conflict and

⁸⁰ ECtHR, *Handyside v. the United Kingdom*, Judgment of 7 December 1976, Application No. 5493/72, para. 49.

⁸¹ ECtHR, *Erbakan v. Turkey*, Judgment of 6 July 2006, Application No. 59405/00, para. 56.

⁸² See, ECtHR, *Pavel Ivanov v. Russia*, Decision on the Admissibility of 20 February 2007, Application No. 35222/04; ECtHR, *W.P. and Others v. Poland*, Decision on the Admissibility of 2 September 2004, Application No. 42264/98.

⁸³ See, European Commission of Human Rights, *Glimmerveen and Hagenbeek v. the Netherlands*, Decision of 11 October 1979.

⁸⁴ See, ECtHR, *Norwood v. the United Kingdom*, Decision on the Admissibility of 16 November 2004, Application No. 23131/03.

⁸⁵ ECtHR, *Balsytė-Lideikienė v. Lithuania*, Judgement of 4 November 2008, Application No. 72596/01.

⁸⁶ ECtHR, *Soulas and Others v. France*, Judgement of 10 July 2008, Application No. 15948/03; *Féret v. Belgium*, 16 July 2009.

⁸⁷ ECtHR, *İ.A. v. Turkey*, Judgement of 13 September 2005, Application No. 42571/98.

⁸⁸ NEPLP, Decision of 3 April 2014 prohibiting rebroadcasting of Rossiya RTR in Latvia for three months, 2014a, paras. 17.

incited hatred for reasons of ethnicity or nationality.”⁸⁹ In order to support their arguments the NEPLP cited judgements of the ECtHR that, in the absence of hate speech provisions, had referred to “the issues of pluralism in public broadcasting, the need for journalists to observe professional ethics, and the general design of the ECHR to maintain and promote the democratic ideals and values”⁹⁰.

Art. 19 ICCPR guarantees the right to hold opinions (Art. 19 (1) ICCPR) and the right to freedom of expression (Art. 19 (2) ICCPR). However according to Art. 19 (3) ICCPR these rights carry with it special duties and responsibilities. They may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for respect of the rights or reputations of others, for the protection of national security or of public order (ordre public), or of public health or morals.

Art. 20 ICCPR prohibits any propaganda for war and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

There seems to be consent that the prohibition of propaganda for war and hate speech under Art. 20 ICCPR does not only trigger the responsibility of the mass media and other private enterprises but also the protective duty of governments. Any other reading would allow governments to shirk off their responsibility. “[W]hile powerful media corporations are indeed able to use their own initiative and means to disseminate such propaganda [...] it is unlikely to be launched without at least implicit support of a third state.”⁹¹ There is however great debate about the question how broad the term ‘prohibition of war propaganda’ should be interpreted and whether it is to be limited to direct ‘incitement to war’ or whether it additionally encompasses “propaganda which serves either as a means of preparation for a future war or to preclude peaceful settlement of disputes”⁹².

However none of the courts or national authorities have made references to Art. 19 or 20 ICCPR so far when suspending rebroadcasting of TV Channels. *Andrei G. Richter* suggests that this is caused by inconclusive interpretations of the UN Human Rights Committee and the preference of the national authorities and courts to invoke Art. 10 ECHR which is a far more familiar instrument steadily interpreted by the ECtHR.⁹³

Art. 4 CERD states that all parties to the Convention “condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination ... with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Art. 5 of this Convention. In this regard the states are obliged to declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin (Art. 4 (a) CERD). They shall furthermore declare illegal and prohibit organizations and all other propaganda activities, which promote such discrimination, and shall recognize participation in such

⁸⁹ *Richter* (fn. 27), p. 3132, citing: NEPLP (fn. 88), para. 17.2-17.3.

⁹⁰ *Richter* (fn. 27), p. 3139.

⁹¹ *Office of the OSCE Representative on Freedom of the Media*, (fn. 28), p. 14; citing: *Michael G. Kearney*, *The Prohibition of Propaganda for War in International Law*, Oxford 2007, p. 9.

⁹² *Ibid.*

⁹³ *Richter* (fn. 27), p. 3139.

organizations or activities as an offence punishable by law (Art. 4 (b) CERD). Finally the state parties are required not to permit public authorities or public institutions, national or local, to promote or incite racial discrimination (Art. 4 (c) CERD). The Additional Protocol to the Cybercrime Convention aims at providing an adequate legal response to propaganda of a racist and xenophobic nature committed through computer systems. It obliges its parties to adopt legislation (and if necessary to establish as criminal offences under its domestic law) prohibiting the dissemination of racist and xenophobic material through computer systems (Art. 3), racist and xenophobic motivated threats (Art. 4), racist and xenophobic motivated insults (Art. 5) and the distribution of denying, grossly minimising, approving or justifying genocide or crimes against humanity.

Both treaties establish an explicit obligation of the states to prohibit propaganda and can therefore be read as proof of a protective duty of the state parties.

Even though Lithuania ratified the CERD in 1998⁹⁴ and the Additional Protocol to the Cybercrime Convention in 2006⁹⁵ neither one of them is mentioned in the RTCL's decision. The Lithuanian authorities do not elaborate on a potential protective duty deriving from their obligations under international law, not 'binding themselves' by explicitly admitting to such an obligation and thus leaving the backdoor open.

II. Political Aspects

The former United States Ambassador to Lithuania *Deborah A. McCarthy* said "[a] preferred strategy of the RTCL has been to dole out temporary broadcasting bans of three months to channels that in its view incited violence or aired blatant disinformation. In the long term, content restrictions are not an effective means of combating disinformation. In fact, they run the risk of feeding the existing Russian narrative that Lithuania wants to keep the truth out."⁹⁶ There lies a lot of truth at the heart of this statement, as "only a well-functioning open, diverse and dynamic media environment can effectively neutralize the effect of propaganda".⁹⁷

In addition to the above described legal instruments to counteract propaganda to war and incitement to hatred by banning them, it thus appears of great interest to take a look at politically preferable strategies to combat propaganda.

Strategies to combat propaganda will have to tackle the problem of propaganda at many different levels. In the following I will introduce different strategies proposed by various authors to combat propaganda on a national, EU but also NATO level.

1. Combating ethnic tensions and separatist movements by building trust and enhancing dialogue between majorities and minorities in Lithuania

One of the most promising strategies to combat propaganda is to address its underlying reasons. As described above, Russian propaganda is mainly aiming at the Russian-speaking

⁹⁴ See: <http://indicators.ohchr.org/> (last accessed on 26/04/2017).

⁹⁵ See: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/189/signatures?p_auth=avB3ULRF (last accessed on 26/04/2017).

⁹⁶ *Deborah A. McCarthy*, (former) United States Ambassador to Lithuania, *Defending the Tower in the Age of Twitter: Lithuanian Lessons on Russian Disinformation*, *The Ambassadors REVIEW*, Spring 2015, p. 33 (35); see also *Mindaugas Kukyls* and *Raul Cârstocea*, (fn. 6), p. 11.

⁹⁷ *Dunja Mijatovic*, OSCE Representative on Freedom of the Media, cited by *Aleksandra Kuczyńska-Zonik*, (fn. 5), p. 97.

minorities in the Baltic States, feeding feelings of animosity against the majorities in the Baltic States and promoting separatist claims. "These instigations aim to polarize ethnic groups by encouraging them to choose only one identity dimension at the expense of the others, for persons with double or multiple ethnic identities [...] (local, regional, and national, linguistic, cultural, religious etc.)"⁹⁸.

In order to remove the *raison d'être* for such propaganda a direct engagement and intensified dialogue between the mainly Russian-speaking (but also Polish-speaking) minorities and the Lithuanian-speaking majority must be promoted. This requires encouraging exchange between minorities and majority at an institutional but also a communal level with a particular emphasis on an exchange of information, where both parties can express their views and learn about the others' needs and demands personally instead of through distorted and politically charged media channels.⁹⁹

Such a dialogue could increase trust between the different parties and seems to be the most fruitful strategy to counteract propaganda in the long term.

2. A Common European Communications Strategy

A more strategic approach has been adopted on European Union Level. In March 2015 the EU decided to develop an action plan on strategic communication.¹⁰⁰ Within the framework of this action the European Union Institute for Security Studies, upon request by the European Parliament has delivered a Report on 'EU strategic communications with a view to counteract propaganda'¹⁰¹ (in the following: the report).

This report suggests a 'Common European Communication Strategy' to combat Russian propaganda. Such 'counter-communication' seems necessary to raise awareness, assert facts, provide alternatives, and require accountability regarding Russian disinformation.

According to the report first and foremost "any credible strategic communication effort [...] must build on research and analyses dissecting the problem(s), the audience(s), and the message(s), and to be planned and implemented accordingly"¹⁰². Kuklys and Cârstocea note in this regard the importance of adapting the policies to local realities, meaning that significant differences exist between the different Baltic States, which need to be thoroughly examined, as the "Kremlin applies different approaches to different regions of the world, using local rivalries and resentments to divide and conquer"¹⁰³. A policy meant to respond to such a challenge should thus be equally wide-ranging and adapted to local realities.¹⁰⁴ Furthermore they emphasise the advantage that can be gained through consulting and involving other countries in Russia's neighbourhood (such as Moldova and Georgia) who have faced similar problems as the Baltic States regarding Russian influence in the process

⁹⁸ Mindaugas Kuklys and Raul Cârstocea, (fn. 6), p. 10.

⁹⁹ Ibid.

¹⁰⁰ ZEIT Online, Die EU zieht in den Propagandakampf, 20.03.2015, available at: <http://www.zeit.de/politik/ausland/2015-03/russland-propaganda-eu-strategie-informationskrieg> (last accessed on 19/04/2017).

¹⁰¹ European Union Institute for Security Studies, (fn. 7).

¹⁰² Ibid, p. 29 f.

¹⁰³ Peter Pomerantsev and Michael Weiss, (fn. 11), p. 43.

¹⁰⁴ Mindaugas Kuklys and Raul Cârstocea, (fn. 6), p.12.

of policy design. “Benefitting from the past experience of these countries would lead to a more refined, realistic and responsive approach to policy-making.”¹⁰⁵

Secondly the report elaborates on the infrastructures to implement such a communication strategy. They call for a fundamental change in the budgetary lines allocated by the EU to ‘communications’. Instead of scattering the ‘communications’ budget across various projects and mini-campaigns making up a “patchwork of micro-initiatives”, the report calls for a more streamlined and pooled external communication, which would be easier to coordinate and could be carried out more efficiently. As part of this new infrastructure plan, the report also calls for training and recruiting staff “fit for purpose”. The authors of the report insist that strategic communication requires know-how which cannot be expected from administrative and technical staff, but rather requires the relevant cultural and linguistic skills of regional analysts and media operators.¹⁰⁶

The, in my opinion, most important proposal of the report relates to the methods and style of the envisaged strategic communication. “In terms of method and style the EU’s ‘communications’ have often been faceless, anonymous, technocratic, unemotional, and reliant of the expectation (or rather assumption) that facts will speak for themselves.”¹⁰⁷ This strategy however is prone to fail in the Post-Truth Age (see above). As *Dorothy McCarthy* ironically noted: “Lithuanians don’t necessarily watch Russian-language programming because they crave a daily dose of spin; they watch because the overall programming packages in which the news is embedded are well-made and entertaining. Thus, the mere presence of Russian-language news alternatives isn’t enough. Viewers cannot be given a choice between dessert and a bowl of vegetables.”¹⁰⁸ Thus the Common European Communications Strategy stipulates that “rapid intervention teams shall quickly develop storylines about major policy issues or unfolding crises, preferably infused with real life situations and testimonies”¹⁰⁹.

As language is the key to communication, these programmes are supposed to be disseminated in as many languages as possible but especially in the local languages of the Eastern Partnership and the Western Balkans and of course in Russian.¹¹⁰ As this will be very costly an alternative could be to simply produce subtitles in Russian and crucial regional languages for already existing European TV programmes. This approach would however ignore the importance of taking local realities (cultural differences regarding humour, daily life problems, relationships, etc. or regional jokes) into account (as suggested above).

In this regard the report furthermore emphasises the importance of “discrete but steady support for independent local media in the region”.¹¹¹ Professional training for local operators, such as capacity building for Lithuanian journalists through anti-propaganda journalism Tech Camps or Tours of the Baltic States for Russian-speaking journalists led by the US and NATO¹¹² and other public diplomacy programmes could create a long term development of high quality journalism in the area.

¹⁰⁵ Ibid, p. 12.

¹⁰⁶ *European Union Institute for Security Studies*, (fn. 7), p. 30.

¹⁰⁷ Ibid.

¹⁰⁸ *Deborah McCarthy*, (fn. 96), p. 34f.

¹⁰⁹ *European Union Institute for Security Studies*, (fn. 7), p. 31.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² See, *Deborah McCarthy*, (fn. 96), p. 36.

3. Combating Propaganda at Grassroots Level – Online Public Information Campaigns

The initiatives may however not stop at that. As the past years have shown the importance of traditional mass-media, such as television, radio and newspapers has declined, as the new media, e.g. online platforms, social media and blogs etc. have succeeded in conquering the media landscape. The spread of Russian propaganda is no longer limited to entertaining TV programmes but enters the Baltic States through strategic trolling of message boards, blogs and tweets.¹¹³ A set of policies designed to respond to the propagation of ethnic animosity, war and incitement to hatred in the online space is still lacking. However, when designing such policies, a fair balance between the freedom of expression and effective monitoring of online threats needs to be struck. In this regard, instead of censorship and public surveillance, the concept of 'counter-speech', which has been broad forward to counteract hate-speech on social media¹¹⁴, may be a useful method to respond to propaganda online.

E. Conclusion

In conclusion the European Commission in its decision of 17 February 2017 rightly decided that the decision adopted by the Radio and Television Commission of Lithuania of 16 November 2016 was compatible with EU Law.

Furthermore the Lithuanian authorities could have also adopted such a resolution under national law (e.g. Art. 19 and 34 LPI) as they have done before or under international law (e.g. Art. 20 ICCPR). As shown above it can also be argued that the Lithuanian authorities were in fact obliged under international law to prohibit such propaganda due to their protective duty arising under their international human rights obligations.

However the decision to suspend rebroadcasting of a TV Channel alone is – taking into account the political implications – not sufficient, as it does not tackle the problem at its basis nor is it particularly effective. Channels might still be watched over the internet through proxies. The suspensions only target single programmes and not 'information warfare' as such and represent only a short time measure (3 month). It can even have a negative effect as it feeds the Russian narrative that Lithuania is trying to silence the truth and potentially undermine Lithuania's credibility.

Therefore it appears most promising to adopt strategies which combat propaganda at its roots. As suggested above combating ethnic tensions and separatism movements by building trust and enhancing institutional and communal dialogues between majorities and minorities in Lithuania, adopting a common European Communication Strategy and initiating public Information campaigns are possible strategies to counteract propaganda in the long run.

In this regard we need to remind ourselves that we live in the 'Post-Truth Age' and facts alone will not prevail. Communication strategies operate on a factual and on an emotional level. This means on the one hand that TV and radio programmes, online campaigns, news shows etc. need to be entertaining and emotional, personal and appealing, but much more important, it means that people need to feel included in politics, need to establish a

¹¹³ Ibid p. 34; also, *Mindaugas Kukyls and Raul Cârstocea*, (fn. 6), p. 11.

¹¹⁴ See, *Karoline Schmidt*, Hassreden auf Facebook – Wie weit geht die Meinungsfreiheit?, Saar Blueprints, 04/2015 DE, available at: http://jean-monnet-saar.eu/?page_id=67 (last accessed on 30/03/2017), p. 16.

relationship with their fellow citizens, need to be proud of their country and need to feel safe in their country. Only if a positive feeling towards the nation states, the EU and NATO can be created, propaganda will be defeated.

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